91-158

Supreme Court, U.S.
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NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

HARRY WOLSKY, INC. - PETITIONER

VS.

INDUSTRIAL COMMISSION OF OHIO

AND

OHIO BUREAU OF WORKERS' COMPENSATION -

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF OHIO

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QUESTION PRESENTED FOR REVIEW

MAY A STATE ENGAGED IN THE PROPRIETARY ACTIVITY OF PROVIDING WORKERS' COMPENSATION INSURANCE LIMIT ITS LIABILITY FOR ITS UNLAWFUL TAKING OF PRIVATE PROPERTY (INSURANCE PREMIUM OVERPAYMENTS) TO A GREATER DEGREE THAN PRIVATELY OWNED AND OPERATED INSURERS?

PARTIES TO PROCEEDING

PETITIONER, HARRY WOLSKY INC. ALSO KNOWN AS HARRY WOLSKY STAIR BUILDERS, INC. (A NEW YORK CORPORATION/EMPLOYER ENGAGED IN THE MANUFACTURING OF STAIRWAYS AND STAIRSTEPS WITH NO SUBSIDIARY CORPORATION)

RESPONDENT, THE INDUSTRIAL COMMISSION OF OHIO (A State Agency)

RESPONDENT, OHIO BUREAU OF WORKERS' COMPENSATION (A State Agency)

TABLE OF CONTENTS

OPINIONS BELOW

Decision of the Ohio Supreme Court
Decision Issued April 3, 1991 ..... A(i)

Decision of the Ohio 10th Appellate District Court of
Appeals of Ohio
Unreported Decision, November 9, 1989
87AP 1098-4351 ..... A(ii)

JURISDICTIONAL GROUNDS FOR REVIEW

(1) Decision of the Ohio Supreme Court Rendered April 3, 1991 (Final Order of Court of Last Resort of the State of Ohio)

(2) Article 3, Section 2 (Dispute between State of Ohio and New York Corporation) and the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE 1

CERTIFICATE OF SERVICE 5

STATEMENT OF THE CASE

In February, 1978, Petitioner, Harry Wolsky Inc., a New York Corporation, applied to the Respondents, Ohio Bureau of Workers' Compensation and Ohio Industrial Commission for Workers' Compensation coverage for its Employees. The State of Ohio's Bureau of Workers' Compensation is a monopolistic State Insurance Fund which requires Employers to maintain coverage through it or alternatively to show proof of Self-Insurance under limited circumstances. In the United States only six States (including the State of Ohio) maintain monopolistic Insurance funds (the remaining States allow Employers to elect between State Insurance Funds and/or Private Insurance Carriers.

The State of Ohio in processing the application for Workers' Compensation Insurance and in assessing Insurance premiums to the Petitioner, Harry Wolsky, Inc., negligently classified and overassessed Petitioner for insurance premiums and such negligent classification resulted in overpayment of approximately Fifty-one Thousand ($51,000) in insurance premiums to the State of Ohio.

The Parties stipulated in the proceedings below and it was established that approximately Fifty-one Thousand Dollars ($51,000) of Workers' Compensation Insurance premiums were overpaid to the Respondent, Ohio Bureau of Workers' Compensation, and upon discovery of the negligent overassessment of Insurance premiums approximately Thirteen Thousand ($13,000) of such premiums

were returned to the Petitioner, Harry Wolsky, Inc. The Respondents failed and refused to return the remaining Thirty-eight Thousand Dollars ($38,000) in overpaid Insurance premium based upon the Respondents' interpretation of their own administrative regulations providing that any overpaid premiums would not be returned beyond a two year period. On Appeal Petitioner raised several issues regarding State Law and also raised the issue of the United States Constitutional Fourteenth Amendment due process clause regarding the State's improper taking of property and its denial of equal protection to the Petitioner. Petitioner, in its initial demands upon Respondents, and its Appeal to the 10th Ohio Appellate District Court of Appeals, and ultimately in its Appeal to the Ohio Supreme Court raised the U.S. Constitutional issues of equal protection and due process in taking Its property in violation of the Fourteenth Amendment to the United States Constitution.

The dissenting opinion of the Ohio Supreme Court addressed the Federal Constitutional questions raised by Petitioner. Consistent with the U.S. Supreme Court Rule 10, Petitioner represents that there are special and important reasons for granting Its Petition for Writ of Certiorari. The Ohio Supreme Court, in its majority decision addressed the Federal issues raised by the Petitioner indicating that there were no Federal due process and equal protection violations pursuant to the Fourteenth Amendment of the United States Constitution. However, the dissenting opinion indicated that

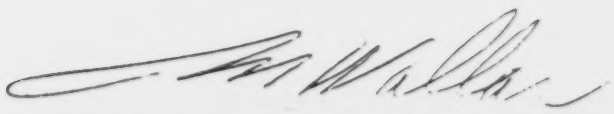
the States' actions in taking the Petitioner's property was void ab initio and thus the Petitioner had and has an absolute right to a return of its improperly taken property.

Wherefore, the Petitioner respectfully submits that this Court grant its Petition.

In summation, the Petitioner is a Corporation and a citizen of the State of New York. It conducted business activities as an Employer in the State of Ohio and as a result of its activities in the State of Ohio was compelled to participate in and purchase Insurance coverage from the Respondents, State of Ohio Bureau of Workers' Compensation and Industrial Commission. The Respondents negligently performed their duties in assessing Insurance premiums and as a result thereof improperly and unlawfully deprived Petitioner of its money. Respondents acknowledge their improper taking of the Petitioner's money but have relied on their internal rules and regulations to argue that only those premiums improperly taken within a two year period could be returned and any Insurance premiums improperly taken beyond a two year period would thus be forfeited to the State of Ohio. Petitioner also represents that based upon the proprietary nature of providing workers' compensation insurance that the State of Ohio should be treated the same as other entities providing such insurance coverage and as such the appropriate standard of review of the State's activities should be the same standard applied to private insurers. Thus, if a limitation of action period is appropriate for the improper taking of private property by a State then such appropriate

standard can and must be the same standard applied to other similarly situated entities/Insurers.

Respectfully Submitted by Richard Michael Wallar,
Trial Counsel for Petitioner, Harry Wolsky, Inc.



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing corrected Petition for Writ of Certiorari and Appendix was served upon Respondents, Industrial Commission of Ohio and Ohio Bureau of Workers' Compensation by serving Ohio Attorney General, Lee Fisher and Trial Counsel, Jetta Mencer and Michael Squillace by serving them a copy of the foregoing Petition by regular U.S. mail by postage prepaid at their addresses of 65 East State Street, Suite 708, Columbus, Ohio 43266-0590 on July 22/1991.

Richard Michael Wallar, Trial Counsel for Petitioner

APPENDIX

THE STATE, EX REL. HARRY STAIR BUILDERS, INC., APPELLANT, v INDUSTRIAL COMMISSION OF OHIO ET AL., APPELLEES.

(Cite as State, ex rel. Harry Wolsky Stair Builders, Inc., v. Indus. Comm. (1991), 58 Ohio St. 3d 222.)

Workers' compensation–Refund of overcharged premiums limited to the period "twenty-four months immediately prior to the beginning of the current payroll reporting period"–Ohio Adm. Code 4121-7-17(C).

(No. 90-15–Submitted November 13, 1990–Decided April 3, 1991.)

APPEAL from the Court of Appeals for Franklin County, No. 87AP-1098.)

In 1978, appellant, Harry Wolsky Stair Builder, Inc., a New York corporation, filed an "Application for Classification of Industry and Premium" with appellee Bureau of Worker' Compensation ("bureau") in order to obtain coverage for prospective Ohio employees. Appellant described its operations as a :(manufacturer of stairs (wood)."

The bureau assigned Ohio State Workers' Compensation Insurance Fund Manual number ("manual number") 2731 to appellant's activities and assessed premiums accordingly. Correspondence between the bureau and appellant referred to manual number 2731 and described appellant as a wooden staircase manufacturer. Wooden staircase construction, however, corresponded more closely with manual number 2883, a lower risk classification with lower pre-

mium rates than activities classified under manual number 2731.

In early 1984, appellant received the bureau's payroll report describing appellant's activities as wooden pallet manufacturing, which fell under manual number 2731. Appellant notified the bureau of the error and requested a refund of any overcharged premiums.

Relator calculated an overpayment of $38,232.32. The bureau, following an audit, refunded $13,267.84 for premiums overpaid after December 31, 1981. The bureau refused to refund the amount overcharged from February 21, 1978 through December 31, 1981, citing Ohio Adm. Code 4121-7-17(C). Appellant unsuccessfully appealed to appellee Industrial Commission of Ohio ("commission").

Appellant filed a complaint in mandamus in the Court of Appeals for Franklin County, seeking to compel full bureau reimbursement. The court denied the writ.

The case is now before this court upon an appeal as of right.

Neal Dillon Co., L.P.A., and *Richard M. Wallar*, for appellant.

Lee I. Fisher, attorney general, *Jetta Mencer* and *Michael L. Squillace*, for appellees.

Per Curiam. Ohio Adm. Code 4121-7-17(C) states in part:

"* * * The Commission and Bureau shall also have the right to make adjustments as to classifications, allocation of wage expenditures to classifications, amount of wage expenditures, premium rates and/or amount of premium. No adjustments, however, shall be made in an employer's account which result in reducing the amount of premium below the amount of contributions made by the employer to the fund for the periods involved, except in reference to adjustments for the semi-annual and/or adjustment period ending

within twenty-four months immediately prior to the beginning of the current payroll reporting period, when such errors affecting the reports and the premium are brought to the attention of the Commission and Bureau by an employer through written application for adjustment or found by the Commission and Bureau."

Appellant initially contends, in essence, that a bureau overpayment error negates Ohio Adm. Code 4121-7-17(C)'s two-year refund limitation period and entitles appellant to full restitution. This contention lacks merit. Whether an error creates an underpayment or overpayment, adjustment is limited to the period "twenty-four months immediately prior to the beginning of the current payroll reporting period * * *." No distinction is made between employer and bureau error, nor is a different refund limitation period created for the latter.

The bureau, in promulgating this rule, perhaps anticipated the inevitability of error, including its own. Had it desired to include the exemption appellant advances, it could have done so. Instead, the bureau provided that all errors, regardless of by whom and in whose favor, would be treated uniformly.

Appellant next assets that an equal protection violation ensures from overassessment since "similarly situated manufacturers competing with Appellant were afforded more favorable (lower) rates." This, too, is unpersuasive.

An appropriate equal protection analysis appears in *Cleveland v. Indus. Comm.* (1983), 8 Ohio App. 3d 7, 8 OBR 7, 455 N.E. 2d 1085. There, the commission attempted to collect significant underpayments made by the city of Cleveland more than two years prior. Cleveland challenged the commissioner's actions, alleging, *inter alia*, a violation of equal protection.

The trial court found, and the appellate court agreed, that "(n)o party, other than Plaintiff, has

ever been billed or collected from after a two year period to the knowledge of all the witnesses." *Id.* at 8, 8 OBR at 9, 455 N.E. 2d at 1087. The trial court's determination that the commission " 'singled out the City of Cleveland for payment of previously underbilled Workers' Compensation premiums more than two years after the rate effective for the year 1976 was established' " sufficiently supported "the findings that plaintiff received disparate treatment in violation of the foregoing constitutional provisions." *Id.* at 10, 8 OBR at 11, 455 N.E. 2d at 1089.

In the case of bar, there is no evidence that the commission has ever refunded overpayments made in excess of two years to other employers. Because appellant has not demonstrated such unequal treatment, its equal protection contention fails.

Appellant's due process argument is similarly unconvincing since the allegations on which it is premised are inaccurate. First, appellant did appeal the classification assessment on two occasions – first to the commission's adjudicating committee on September 26, 1986 and then to the commission on May 21, 1987. Second, there is no evidence of record that either the commission or the bureau ever denied a request for hearing. To the contrary, the record does not show that appellant ever requested one. We thus find no evidence to support the claimed due process violation.

Finally, appellant argues that the bureau has a fiduciary duty to it that requires the bureau to make full restitution. This is again incorrect. Appellee's sole fiduciary responsibility is to the State Insurance Fund. *State ex rel. Weimer, v. Indus. Comm.* (1980). 62 Ohio St. 2d 159, 16 O.O. 3d 174, 404 N.E. 2d 149. Appellee occupies no such relationship to any employer, including appellant.

Accordingly, the judgment of the court of appeals is affirmed.

Judgment affirmed.

MOYER, C.J., SWEENEY, DOUGLAS, H. BROWN and RESNICK, JJ., concur.

HOLMES and WRIGHT, JJ., dissent.

HOLMES, J., dissenting. I dissent from the unfair result reached by the majority in this case. Appellant, Harry Wolsky Stair Builder, Inc., a foreign corporation, paid its premiums in good faith into the Ohio State Workers' Compensation Insurance Fund, from February 21, 1978 through July 27, 1984. The majority concedes that appellant is entitled to the overpayments made after December 31, 1981, but invokes Ohio Adm. Code 4121-7-17(C) to deny appellant its proper recoupment. Clearly, Ohio Adm. Code 4121-7-17(C) is not applicable in this case. Ohio Adm. Code 4121-7-17(C) only applies to situations where the Industrial Commission and Bureau of Workers' Compensation make "* * * adjustments as to classifications, allocation of wage expenditures to classifications, amount of wage expenditures, premium rates and/or amount of premium". In this instance, the bureau overcharged the appellant from February 21, 1978 through December 31, 1981. The appellant's status as a wooden staircase manufacturer never changed. The bureau mistakenly overcharged appellant for premiums corresponding to a wooden pallet manufacturer, although informing appellant that its status was a wooden staircase manufacturer. There could be no adjustment by the bureau since its excessive charge for premiums was void *ab initio*.

Assuming *arguendo* that Ohio

Adm. Code 4121-7-17(C) is applicable to the facts in this case, the majority opinion reaches an erroneous result on two grounds. First, applying Ohio Adm. Code 4121-7-17(C) in the manner prescribed by the majority violates both Section 2, Article I of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution. 1 The appellant was informed by the bureau, during the period at issue, that its premiums conformed to its classification. The appellant had no reason to object to the premiums, while assuming that the state properly charged it for insurance coverage. When the appellant was informed of the bureau's erroneous calculation of premiums for the prior six years, it immediately sought a refund of the overcharged premiums. By applying Ohio Adm. Code 4121-7-17(C) to deny appellant its overpayment, the majority, in effect, has taken appellant's property without the benefit of due process of law. And, the difference in treatment by the bureau toward appellant and other similarly situated wooden staircase manufacturers is tantamount to a denial of equal protection under the law.

Furthermore, in applying Ohio Adm. Code 4121-7-17(C), the majority has retroactively impaired appellant's substantive right to obtain a refund.2 The time limit for corrections of inaccuracies affecting employers' premium rates under Ohio Adm. Code 4121-7-17(C) became effective on November 26, 1979 (see Ohio Adm. Code 4121-7-28(B); however, the majority has foreclosed the appellant from seeking redress prior to January 1, 1982. The result is that appellant had to have known about the bureau's error before the elapse of the reporting period covering the first half of 1980. That is to say, subsequent to the promul-

gation of the established limitation period, on November 26, 1979, appellant had until June 30, 1980 to recognize that it was being overcharged, but appellant during this entire period was informed by the bureau that its premiums were in line with the classification recognized by the partied (*i.e.*, a wooden staircase manufacturer).

Thus, for the foregoing reasons, I respectfully dissent.

WRIGHT, J., concurs in the foregoing dissenting opinion.

1The Fourteenth Amendment to the United States Constitution provides in pertinent part:

"* * * nor shall any State deprive any person of * * * property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 2, Article I of the Ohio Constitution provides in relevant part:

"All political power is inherent in the people. Government is instituted for their (the people's including corporations') equal protection and benefit * * *."

2With respect to retroactive laws, Section 28, Article II of the Ohio Constitution provides:

"The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state."

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio, ex rel. Harry Wolsky Stair Builder, Inc.,	:	
Relator,	:	
v.	:	No. 87AP-1098
The Industrial Commission of Ohio, and Ohio Bureau of Workers' Compensation,	:	(REGULAR CALENDAR)
Respondents.	:	

O P I N I O N
Rendered on November 9, 1989

NEAL DILLON CO., L.P.A., and MR. RICHARD M. WALLAR, for Relator.

MR. ANTHONY J. CELEBREEZE, JR., Attorney General, MR. MICHAEL SQUILLACE and MR. MERL H. WAYMAN, for Respondents.

ON OBJECTIONS TO REFEREE'S REPORT
IN MANDAMUS

WHITESIDE, J.

This original action in mandamus, pursuant to Civ. R. 53 and Loc. R. 11 of this court, was referred to a referee who has rendered a report recommending that the requested writ of mandamus be denied, to which relator, Harry Wolsky Stair Builder, Inc., has filed objections contending the legal conclusions of the referee to be erroneous.

Relator seeks an order from this court ordering respondents Industrial Commission and Ohio Bureau of Workers' Compensation to refund to relator overpayments of premiums payable for reporting periods occurring prior to January 1, 1982. Relator filed its initial application for classification of industry and determination of premium in February 1978, at which time a determination was made determining the appropriate premium but, predicted upon Manual Number 2731, which includes pallet manufacturing–wood, whereas, realtor contends that the appropriate manual number was 2883-18. Respondents did not disagree with realtor's contention that the correct manual number is 2883-18. Following relator's application letter for correction of the premium rating by letter application dated July 27, 1984, respondents corrected the rating and ordered a refund for all semi-annual adjustment periods ending two years before the application date. The limitation of the period of refund was pursuant to Ohio Adm. Code 4121-7-17(C), which states in pertinent part:

> "**** No adjustments, however, shall be made in an employer's account which result in reducing the amount of premium below the amount of constitutions made by the employer to the fund for the periods involved, except

> in reference to adjustments for the semi-annual and/or adjustment periods ending within twenty-four months immediately prior to the beginning of the current payroll reporting period, when such errors affecting the reports and the premium are brought to the attention of the Commission and Bureau ***."

Relator contends that either R.C. 2305.06 or 2305.07, pertaining to written and oral contracts respectively, should be applied. Neither of those statutes of limitations is applicable. There is no contract. Nor is there a liability created by statute to which R.C. 2305.07 could be applicable. Furthermore, these statutes pertain to the time in which an action should be commenced in court. the closest statutory limitation would be that of R.C. 2723.01, which provides that actions to recover illegal levy or collection of taxes and assessments must be brought within one year after the taxes or assessments are collected.

Relator also contends that a discovery rule should apply. There is, however, no statutory provision for refund of workers' compensation premiums erroneously paid. Rather, the entire subject of refund in case of error is set forth by regulation, including the regulation which contains the two-year limitation.

As stated in the syllabus of State, ex rel. DeBoe, v. Indus. Comm. (1954), 161 Ohio St. 67, the rules and regulations promulgated by the Industrial Commission and the Bureau of Workers' Compensation are valid and enforceable unless unreasonable or in conflict with statutes, so long as the promulgation has been in accordance with R.C. Chapter 119. See, also, R.C. 4121.30(A) and 4123.20.

We do not find the twenty-four-month limitation to be unreasonable under the circumstances involved. Under the rule, Relator received a refund for a period of two and one-half years covering the

period of January 1, 1982, to June 30, 1984. It was denied a refund for premiums paid from February 21, 1978, to December 31, 1981. Relator has not pointed out any status with which the rule conflicts, nor are we aware of any. Relator does urge that a discovery rule be adopted, but we find it not to be unreasonable for the respondents not to adopt a discovery rule.

Relator also refers to the status of limitation period stated in R.C. 2305.09, which again is not pertinent here, since no court action was commenced, nor is the application for refund a claim for recovery of personal property or for taking or detaining it. In short, the several statutes of limitations relied upon by realtor not only do not apply because of the nature of the claim, but such statutes apply to actions brought in courts, not administrative remedies. Here, relator sought an administrative remedy created and governed by administrative rule, which contains within itself a limitation period for pursuing the administrative remedy. The only action in court that relator has commenced is this action seeking a writ of mandamus ordering the respondent Industrial Commission to act. To be entitled to such a writ, realtor must show a clear legal right to the requested relief, as well as a clear legal duty on the part of respondents to provide such relief. In light of the administrative remedy created by regulation, and the limitation of that regulation, we find that relator has demonstrated neither.

Accordingly, the objections to the referee's report are overruled, the referee's report as amplified herein is approved and

adopted as that of the court, and the requested writ of mandamus is denied.

Writ denied.

STRAUSBAUGH and AMMER, JJ., concur.

AMMER, J., of the Pickaway County Court of Common Pleas, sitting by assignment in the Tenth Appellate District.